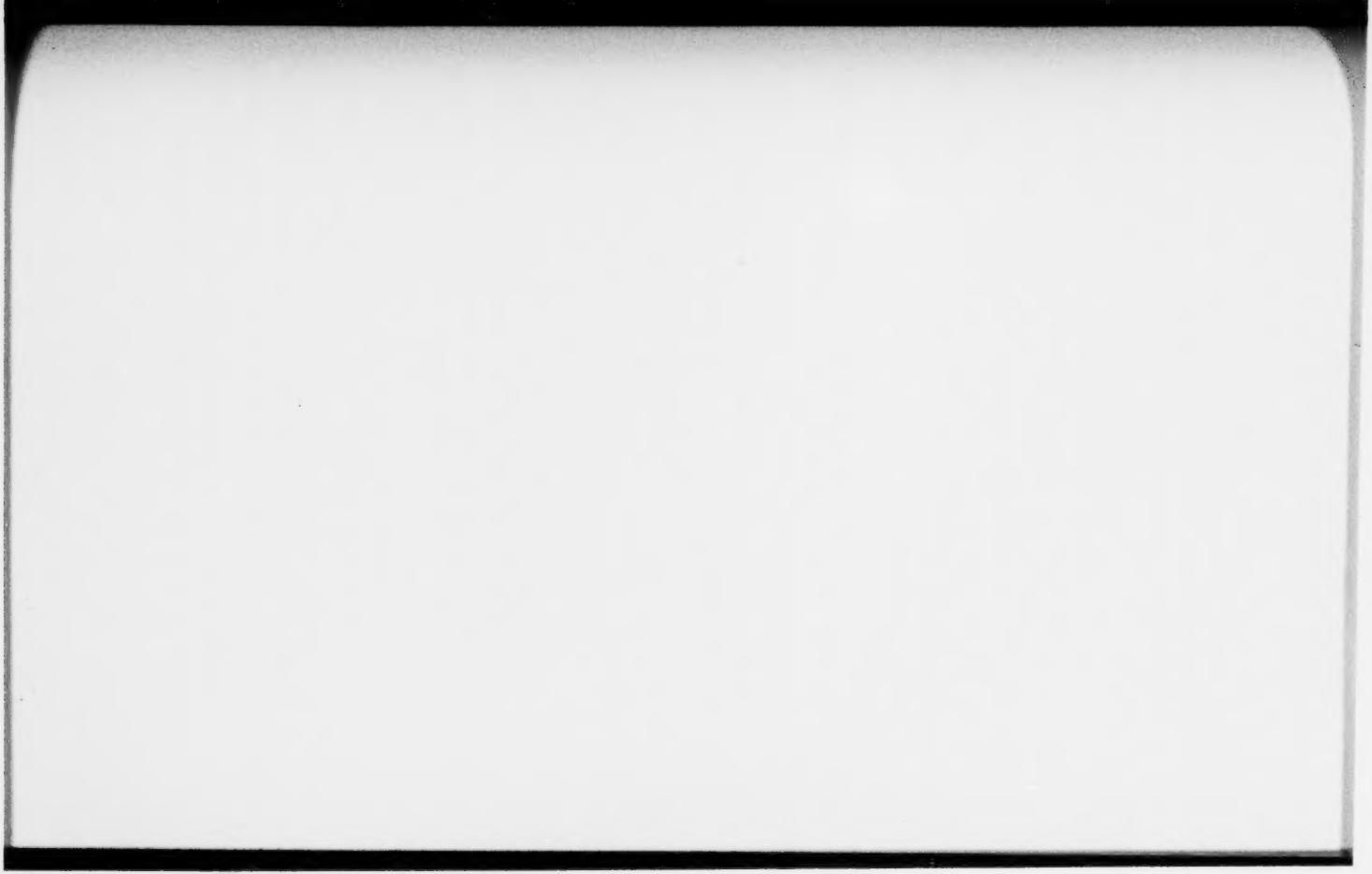

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483438—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 310

JOHN LEN LACY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 58–65) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 18, 1942 (R. 65), and a petition for rehearing (R. 66–71) was denied July 22, 1942 (R. 72). The petition for a writ of certiorari was filed August 17, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of Feb-

ruary 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether Section 284 of the Judicial Code, as amended, prohibits concurrent grand juries in different divisions of the same judicial district.

2. Whether the summoning of a grand jury on April 28, 1941, for the Lake Charles division of the western district of Louisiana, was illegal because the grand jury previously convened for the regular December 1940 term of the same division had not been discharged and the regular May 1941 term of the division had not yet begun, a special term, however, having begun on April 28, 1941.

STATUTE INVOLVED

Section 284 of the Judicial Code, as amended by the Act of February 25, 1931, c. 297, 46 Stat. 1417 (28 U. S. C. 421), so far as pertinent here, provides:

> No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to a district judge of the district that the exigencies of the public service require

it, the judge may, in his discretion, also order a venire to issue for a second grand jury. If the United States attorney for the southern district of New York shall certify in writing to the senior district judge of said district that the exigencies of the public service require it, said judge may, in his discretion, also order a venire to issue for a third grand jury. The district court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months: * * *.

STATEMENT

Petitioner and one Morris were indicted on April 29, 1941, by a grand jury which had been summoned to inquire for the western district of Louisiana at a term of the district court begun and held at Lake Charles, Louisiana, on April 28, 1941 (R. 2). Petitioner was convicted (R. 52) on two counts charging the substantive offenses of corruptly endeavoring to influence and impede a petit juror in the discharge of his duty, and cor-

ruptly endeavoring to influence, obstruct, and impede the administration of justice (Criminal Code, sec. 135, 18 U. S. C. 241), and on another count charging a conspiracy to commit the substantive offenses (Criminal Code, sec. 37, 18 U. S. C. 88) (R. 2–4, 5–10);[1] he was sentenced generally to imprisonment for two years (R. 54).

Petitioner attacked the validity of the indictment by plea in abatement (R. 11–12), which was overruled (R. 14–15), the grounds therefor being the same as two of those which are here relied upon and which are discussed in the Argument, *infra,* pp. 6–9. In connection with the questions raised by the plea, the following facts were stipulated (R. 13–14):

> In this cause it is stipulated and agreed by and between the United States Attorney and counsel for defendants that Adolph Jacobs was duly appointed Jury Commissioner in October, 1924, by Honorable Ben C. Dawkins, Judge of this Court.
>
> That the said Jacobs is still serving in this capacity, and that the other four Commissioners for the Western District of Louisiana were appointed at various dates later, and the said Dalton, who was the

[1] The indictment was in five counts. Petitioner was charged with separate substantive offenses in counts 1 and 2 (R. 2–4), and Morris was charged with separate substantive offenses in counts 3 and 4 (R. 4–5). Both defendants were charged with conspiracy in count 5 (R. 5–10). Morris was convicted on counts 3, 4, and 5 (R. 52) but did not appeal (R. 59).

Commissioner drawing the jury in Lake Charles in April, 1941, was appointed Commissioner by the Honorable Ben C. Dawkins, Judge of this District in April, 1932.

That on October 19th, 1940, an order was issued by this Court convening a Grand Jury for the entire Western District of Louisiana, to be held at Shreveport, Louisiana, on November 4th, 1940.

That on November 22nd, 1940, an order was issued by this Honorable Court calling and convening a Grand Jury for the entire Western District of Louisiana to be held at Lake Charles on December 16th, 1940.

That on February 7th, 1941, an order was issued convening a Grand Jury for the entire Western District of Louisiana to be held at Shreveport on February 24th, 1941.

That on April 11th, 1941, an order was issued by this Honorable Court calling and convening a Grand Jury to be held at Lake Charles on April 28th, 1941.

That on May 26th, 1941, an order was issued recalling the Grand Jury previously drawn in order of date, February 7th, 1941, to be held for the entire Western District of Louisiana at Shreveport, Louisiana, on June 10th, 1941.

That in each case the Grand Juries were adjourned subject to call.

That the names placed in the Jury Box at Lake Charles and from which the Jury was drawn at Lake Charles on April 16th, 1941, and on December 20th, 1940, were

placed therein by a Deputy Clerk and the said Dalton, acting as Commissioner.

ARGUMENT

Petitioner contends that under Section 284 of the Judicial Code (28 U. S. C. 421, *supra*, pp. 2–3), only one grand jury may be convened and sitting, or subject to call, at one time in a judicial district, unless the district has a city or borough containing at least 300,000 inhabitants; he argues that since the western district of Louisiana has no city or borough of such size, the district court had no authority to convene the grand jury at Lake Charles on April 28, 1941—the grand jury which indicted him on April 29—because the grand jury previously convened at Shreveport on February 24, 1941, had not yet been discharged (Pet. 6, 9, 14–16). This contention is without merit.

Section 284 was originally Section 810 of the Revised Statutes (1878) and, so far as pertinent here, contained only the first and fourth sentences quoted above (*supra*, pp. 2–3) providing for summoning of a grand jury by the district court "in term" to serve at and for such time as the court might direct. The second sentence providing for a second grand jury in a district containing a city or borough of at least 300,000 people was added by the Act of March 28, 1910, c. 134, 36 Stat. 267, and the section as so amended was subsequently enacted as Section 284 of the Judicial Code (Act of March 3, 1911, c. 231, sec. 284, 36 Stat. 1087, 1165). The third sentence providing

for a third grand jury in the southern district of New York was added by the Act of February 25, 1931, c. 297, 46 Stat. 1417.[2]

We think it is clear that under the provision of the fourth sentence the district court is authorized to summon a grand jury to serve at each term of court held in the district. As Circuit Judge Maris held in *United States* v. *Perlstein,* 39 F. Supp. 965, 971 (D. N. J.), "the statute contemplates that there may be a grand jury serving at each term of court, regular or special, which is being held in the judicial district at a given time, but, except as specially permitted, never more than one at the same place of holding court." Cf. *Borgia* v. *United States,* 78 F. (2d) 550, 552–553 (C. C. A. 9), certiorari denied, 296 U. S. 615. Hence, the statute on its face authorizes concurrent grand juries at various places in a one-division district during different terms and, *a fortiori,* in different divisions of a multiple-division district. The western district of Louisiana is divided into five divisions [3] and, consequently, the

[2] This amendment also added the fifth sentence empowering a district judge to authorize a grand jury to sit during the term succeeding that for which it was convened to finish investigations begun but not finished during the term.

[3] Section 84 of the Judicial Code (28 U. S. C. 159) designates the five divisions and prescribes the terms of court therein, as follows:

"* * * Terms of the district court for the Opelousas division shall be held at Opelousas on the first Mondays in January and June; for the Alexandria division, at Alexandria on the fourth Mondays in January and June; for the

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district court for that district may summon grand juries to serve simultaneously in the different terms of court held in the various divisions. It is therefore immaterial that the grand jury convened for the statutory February 1941 term at Shreveport had not been discharged when the jury which indicted petitioner was convened for the term beginning April 28, 1941, at Lake Charles.

There is nothing in the amendments adding the second and third sentences of Section 284 which requires the construction for which petitioner contends. Those provisions merely authorize, in certain districts, more than one grand jury to be summoned to serve simultaneously during the same term of court. Petitioner argues that certain portions of the legislative history of the amendment of February 25, 1931, which added the provision for a third grand jury in the southern district of New York, support his contention (Pet. 10–13). However, there is nothing in the Attorney General's letter to the Chairman of the Senate Judiciary Committee proposing the amendment, upon which petitioner relies (Pet. 11–12), which indicates that the Attorney General doubted the authority of the district courts to summon grand juries to serve simultaneously in

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Shreveport division, at Shreveport on the third Mondays in February and October; for the Monroe division, at Monroe on the first Mondays in April and October; and for the Lake Charles division, at Lake Charles on the third Mondays in May and December."

different divisions of the same district.[4] The Attorney General was concerned only with permitting "more than two grand juries to be in session simultaneously in the Southern District of New York" (see Pet. 11), which is a one-division district (Judicial Code, sec. 97, 28 U. S. C. 178).

Nor does the earlier amendment of March 28, 1910, providing for a second grand jury in a district containing a city or borough of at least 300,000 people, support petitioner's contention. The legislative history of the amendment shows that its sole purpose was to relieve congestion of criminal dockets by "providing for two grand juries to sit concurrently during the same term."[5] There is no indication in the history of the amendment that Congress intended thereby to prohibit the summoning of separate grand juries to serve concurrently in different divisions of the same district.[6]

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[4] It is obvious that if, as petitioner argues (Pet. 13), the Attorney General had any such doubt he would have pressed the recommendation made to the Sixty-ninth Congress for additional grand juries without limit in populous districts, to which he referred in his letter (see Pet. 11), or some other corrective provision.

[5] H. Rep. No. 290, 61st Cong., 2d sess., p. 2.

[6] Petitioner's contention (Pet. 8, 10, 17–18) that only one jury commissioner at one time is authorized for a judicial district is likewise unsound. The statute involved (Judicial Code, sec. 276, 18 U. S. C. 412) imposes no such limitation and, as pointed out by the court below (R. 61), "*United States* v. *Rockefeller*, 221 Fed. [462] 465 [S. D. N. Y.] is direct authority to the contrary." Certificates of the clerk

II

As petitioner also points out, however (Pet. 4–6), the statutory terms for the Lake Charles division of the western district of Louisiana begin on the third Mondays in December and May (Judicial Code, sec. 84, *supra*, p. 7, n. 3); the grand jury which had been convened at Lake Charles on the third Monday in December 1940 (December 16) had not yet been formally discharged, and the next statutory term of court at Lake Charles had not yet begun, when the grand jury which indicted petitioner was convened there on April 28, 1941 (R. 13–14). Although he does not make the contention entirely clear, petitioner questions the validity of his conviction on an indictment which he implies was returned by a second grand jury convened at a term of the court wherein a previously summoned grand jury was still subject to call and had not been discharged. (See Pet. 6, 7.)

This challenge to the validity of the indictment, however, is predicated upon the assumption that the grand jury of April 28, 1941, was convened

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of the district court printed in the appendix to the Government's brief in the circuit court of appeals show that there is a jury commissioner for each division of the western district of Louisiana, that Adolphe Jacobs was appointed commissioner for the Opelousas division in 1924, and that Ira Dalton was appointed for the Lake Charles division in 1933. (See also, R. 13.)

for the Lake Charles December 1940 term of the district court. But, as shown by the records of the court set out in the Appendix, *infra*, pp. 13–18,[7] the grand jury which returned the indictment was summoned for a *special* term of the district court commencing April 28, 1941, at Lake Charles, as permitted by Section 284 of the Judicial Code (*supra*, pp. 2–3). The court was, of course, authorized to call the special term (Judicial Code, sec. 11, 28 U. S. C. 15), and the calling of that term automatically terminated the Lake Charles December 1940 term (*United States* v. *Perlstein*, 39 F. Supp. 965, 968–969 (D. N. J.), and cases cited). Hence, the authority of the first grand jury had ceased, for no order for its continuance was issued and such an order was necessary to give it "vitality subsequent to the term at which it is originally empaneled." *United Staes* v. *Johnson*, 123 F. (2d) 111, 118 (C. C. A. 7); Judicial Code, sec. 284, supra, p. 3.[8]

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[7] In the Appendix, *infra*, pp. 13–18, we have copied from the appendix to the Government's brief in the circuit court of appeals Government Exhibits J–1, J–2, J–3 and J–4, which show that the grand jury which returned the indictment was convened on April 28, 1941, by order of the district court to serve for a special term beginning on that date.

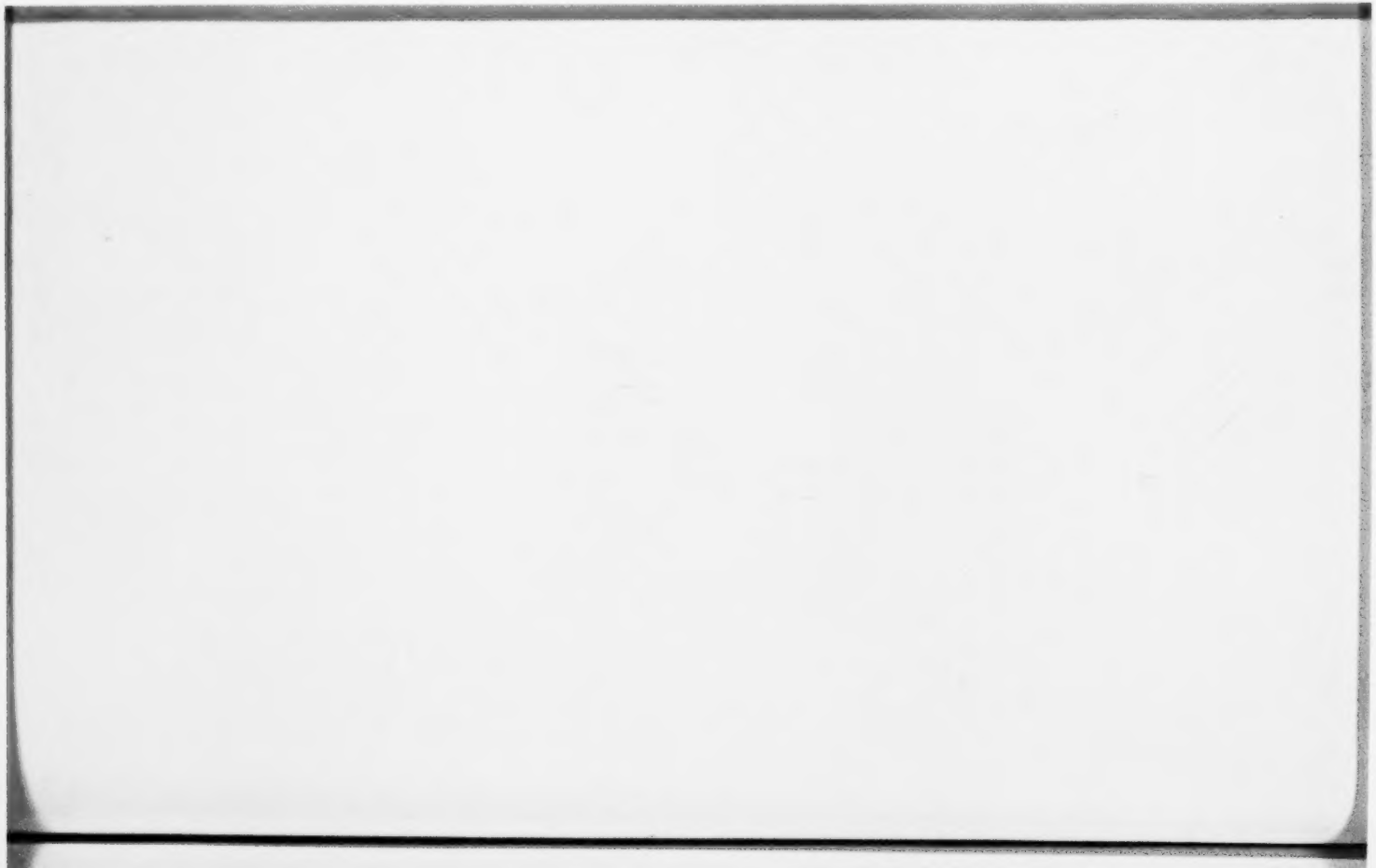
[8] The opinion below does not expressly consider this question, probably because petitioner did not urge it (see R. 61).

CONCLUSION

The decision below is correct and the petition for a writ of certiorari presents no question calling for review by this Court. It is respectfully submitted, therefore, that the petition should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
ROBERT S. ERDAHL,
ANDREW F. OEHMANN,
Attorneys.

SEPTEMBER 1942.



APPENDIX

EXHIBIT J-1

U. S. District Court
Western District of Louisiana
Filed
At Monroe, La.
Apr. 11, 1941
E. C. Jackson, Clerk
Chas. B. Fisher, Dy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA

To the Honorable Ben C. Dawkins and Gaston L. Porterie, Judges of the United States District Court for the Western District of Louisiana:

The petition of the United States, through its counsel, Harvey G. Fields, United States Attorney, and Malcolm E. Lafargue, Assistant United States Attorney, with respect represents:

That at the coming term of the Court at Lake Charles, Louisiana, there are several charges to be investigated, and that it will be necessary to have a grand jury impaneled for the entire district; and it will likewise be necessary to have a petit jury summoned for the trial of certain cases.

WHEREFORE, petitioner prays for an order for the summoning of the grand and petit juries for the Western District of Louisiana and for a term to begin at Lake Charles, Louisiana, on Monday,

April 28, 1941, and suggests 25 persons for grand jury and 35 persons for petit jury service.

HARVEY G. FIELDS,
United States Attorney.
MALCOLM E. LAFARGUE,
Assistant United States Attorney.

ORDER

Considering the foregoing petition:

IT IS ORDERED that a grand jury panel, composed of 25 persons, be drawn for service as grand jurors, and a petit jury panel, composed of 35 persons, be drawn for service as petit jurors, to serve in this Court for this District for the term which is hereby called beginning at Lake Charles, Louisiana, at 10 o'clock a. m. Monday, April 28, 1941, and there to remain until further orders of this Court.

THUS DONE AND SIGNED at Monroe, Louisiana, on this the 11th day of April 1941.

G. L. PORTERIE, *Judge.*

EXHIBIT J–2

PROCESS VERBAL OF DRAWING OF GRAND JURY

U. S. District Court,
Western District of Louisiana.
Filed
Apr. 16, 1941.
E. C. Jackson, Clerk.
M. E. H., Dy.

DISTRICT COURT OF THE UNITED STATES

WESTERN DISTRICT OF LOUISIANA

FIFTH JUDICIAL CIRCUIT

LAKE CHARLES, LOUISIANA, APRIL 28,
SPECIAL TERM A. D. 1941.

BE IT REMEMBERED that on this 15th day of April, A. D. 1941, there were present in the Court Room, Ira M. Dalton, Esq., the regularly appointed and duly qualified Jury Commissioner for the Lake Charles Division of the United States District Court for the Fifth Circuit and Western District of Louisiana; and Seaman M. Mayo, Deputy Clerk of the said United States District Court, and Rene Fuselier, Deputy United States Marshal for said District, and the names of over three hundred (300) persons possessing the qualifications of jurors, residing in the Parishes of Acadia, Allen, Beauregard, Calcasiue, Cameron, Jefferson Davis, and Vernon, were previously placed in the jury box in the manner prescribed by law and the rules of this Court by said Jury Commissioner and said Deputy Clerk, and the said Jury Commissioner proceeded to draw from said box in the manner prescribed by law and the rules of this Court, the names of twenty-five (25) persons to serve as Grand Jurors at the April 28, Spl. Term, A. D. 1941, of the said United States District Court, the names of said Grand Jurors being as follows:

* * * * *